

AMENDED IN SENATE JULY 2, 2015

AMENDED IN ASSEMBLY APRIL 9, 2015

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 856

Introduced by Assembly Member Calderon
(Principal coauthor: Senator Jackson)

February 26, 2015

An act to amend Section 1708.8 of the Civil Code, relating to privacy.

LEGISLATIVE COUNSEL'S DIGEST

AB 856, as amended, Calderon. Invasion of privacy.

Under existing law, except as specified, a person is liable for physical invasion of privacy when that person knowingly enters onto the land of another person without permission or otherwise trespasses to capture any type of visual image, sound recording, or other physical impression of a person engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person. Under existing law, a person is liable for constructive invasion of privacy for the same activity, as specified, through the use of any device, regardless of whether there is a physical trespass. Existing law subjects a person who commits physical or constructive invasion of privacy to specified damages and civil fines.

This bill would expand liability for physical invasion of privacy to additionally include a person knowingly entering into the airspace above the land of another person without permission, as provided.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1708.8 of the Civil Code is amended to
2 read:

3 1708.8. (a) A person is liable for physical invasion of privacy
4 when the ~~defendant~~ *person* knowingly enters onto the land or into
5 the airspace above the land of another person without permission
6 or otherwise commits a trespass in order to capture any type of
7 visual image, sound recording, or other physical impression of the
8 plaintiff engaging in a private, personal, or familial activity and
9 the invasion occurs in a manner that is offensive to a reasonable
10 person.

11 (b) A person is liable for constructive invasion of privacy when
12 the ~~defendant~~ *person* attempts to capture, in a manner that is
13 offensive to a reasonable person, any type of visual image, sound
14 recording, or other physical impression of the plaintiff engaging
15 in a private, personal, or familial activity, through the use of any
16 device, regardless of whether there is a physical trespass, if this
17 image, sound recording, or other physical impression could not
18 have been achieved without a trespass unless the device was used.

19 (c) An assault or false imprisonment committed with the intent
20 to capture any type of visual image, sound recording, or other
21 physical impression of the plaintiff is subject to subdivisions (d),
22 (e), and (h).

23 (d) A person who commits any act described in subdivision (a),
24 (b), or (c) is liable for up to three times the amount of any general
25 and special damages that are proximately caused by the violation
26 of this section. This person may also be liable for punitive damages,
27 subject to proof according to Section 3294. If the plaintiff proves
28 that the invasion of privacy was committed for a commercial
29 purpose, the ~~defendant~~ *person* shall also be subject to disgorgement
30 to the plaintiff of any proceeds or other consideration obtained as
31 a result of the violation of this section. A person who comes within
32 the description of this subdivision is also subject to a civil fine of
33 not less than five thousand dollars (\$5,000) and not more than fifty
34 thousand dollars (\$50,000).

35 (e) A person who directs, solicits, actually induces, or actually
36 causes another person, regardless of whether there is an
37 employer-employee relationship, to violate any provision of
38 subdivision (a), (b), or (c) is liable for any general, special, and

1 consequential damages resulting from each said violation. In
2 addition, the person that directs, solicits, actually induces, or
3 actually causes another person, regardless of whether there is an
4 employer-employee relationship, to violate this section shall be
5 liable for punitive damages to the extent that an employer would
6 be subject to punitive damages pursuant to subdivision (b) of
7 Section 3294. A person who comes within the description of this
8 subdivision is also subject to a civil fine of not less than five
9 thousand dollars (\$5,000) and not more than fifty thousand dollars
10 (\$50,000).

11 (f) (1) The transmission, publication, broadcast, sale, offer for
12 sale, or other use of any visual image, sound recording, or other
13 physical impression that was taken or captured in violation of
14 subdivision (a), (b), or (c) shall not constitute a violation of this
15 section unless the person, in the first transaction following the
16 taking or capture of the visual image, sound recording, or other
17 physical impression, publicly transmitted, published, broadcast,
18 sold, or offered for sale the visual image, sound recording, or other
19 physical impression with actual knowledge that it was taken or
20 captured in violation of subdivision (a), (b), or (c), and provided
21 compensation, consideration, or remuneration, monetary or
22 otherwise, for the rights to the unlawfully obtained visual image,
23 sound recording, or other physical impression.

24 (2) For the purposes of paragraph (1), “actual knowledge” means
25 actual awareness, understanding, and recognition, obtained prior
26 to the time at which the person purchased or acquired the visual
27 image, sound recording, or other physical impression, that the
28 visual image, sound recording, or other physical impression was
29 taken or captured in violation of subdivision (a), (b), or (c). The
30 plaintiff shall establish actual knowledge by clear and convincing
31 evidence.

32 (3) Any person that publicly transmits, publishes, broadcasts,
33 sells, or offers for sale, in any form, medium, format, or work, a
34 visual image, sound recording, or other physical impression that
35 was previously publicly transmitted, published, broadcast, sold,
36 or offered for sale by another person, is exempt from liability under
37 this section.

38 (4) If a person’s first public transmission, publication, broadcast,
39 or sale or offer for sale of a visual image, sound recording, or other
40 physical impression that was taken or captured in violation of

1 subdivision (a), (b), or (c) does not constitute a violation of this
2 section, that person's subsequent public transmission, publication,
3 broadcast, sale, or offer for sale, in any form, medium, format, or
4 work, of the visual image, sound recording, or other physical
5 impression, does not constitute a violation of this section.

6 (5) This section applies only to a visual image, sound recording,
7 or other physical impression that is captured or taken in California
8 in violation of subdivision (a), (b), or (c) after January 1, 2010,
9 and shall not apply to any visual image, sound recording, or other
10 physical impression taken or captured outside of California.

11 (6) Nothing in this subdivision shall be construed to impair or
12 limit a special motion to strike pursuant to Section 425.16, 425.17,
13 or 425.18 of the Code of Civil Procedure.

14 (7) This section shall not be construed to limit all other rights
15 or remedies of the plaintiff in law or equity, including, but not
16 limited to, the publication of private facts.

17 (g) This section shall not be construed to impair or limit any
18 otherwise lawful activities of law enforcement personnel or
19 employees of governmental agencies or other entities, either public
20 or private, who, in the course and scope of their employment, and
21 supported by an articulable suspicion, attempt to capture any type
22 of visual image, sound recording, or other physical impression of
23 a person during an investigation, surveillance, or monitoring of
24 any conduct to obtain evidence of suspected illegal activity or
25 other misconduct, the suspected violation of any administrative
26 rule or regulation, a suspected fraudulent conduct, or any activity
27 involving a violation of law or business practices or conduct of
28 public officials adversely affecting the public welfare, health, or
29 safety.

30 (h) In any action pursuant to this section, the court may grant
31 equitable relief, including, but not limited to, an injunction and
32 restraining order against further violations of subdivision (a), (b),
33 or (c).

34 (i) The rights and remedies provided in this section are
35 cumulative and in addition to any other rights and remedies
36 provided by law.

37 (j) It is not a defense to a violation of this section that no image,
38 recording, or physical impression was captured or sold.

39 (k) For the purposes of this section, "for a commercial purpose"
40 means any act done with the expectation of a sale, financial gain,

1 or other consideration. A visual image, sound recording, or other
2 physical impression shall not be found to have been, or intended
3 to have been, captured for a commercial purpose unless it is
4 intended to be, or was in fact, sold, published, or transmitted.

5 (I) (1) For the purposes of this section, “private, personal, and
6 familial activity” includes, but is not limited to:

7 (A) Intimate details of the plaintiff’s personal life under
8 circumstances in which the plaintiff has a reasonable expectation
9 of privacy.

10 (B) Interaction with the plaintiff’s family or significant others
11 under circumstances in which the plaintiff has a reasonable
12 expectation of privacy.

13 (C) If and only after the ~~defendant~~ *person* has been convicted
14 of violating Section 626.8 of the Penal Code, any activity that
15 occurs when minors are present at any location set forth in
16 subdivision (a) of Section 626.8 of the Penal Code.

17 (D) Any activity that occurs on a residential property under
18 circumstances in which the plaintiff has a reasonable expectation
19 of privacy.

20 (E) Other aspects of the plaintiff’s private affairs or concerns
21 under circumstances in which the plaintiff has a reasonable
22 expectation of privacy.

23 (2) “Private, personal, and familial activity” does not include
24 illegal or otherwise criminal activity as delineated in subdivision
25 (g). However, “private, personal, and familial activity” shall include
26 the activities of victims of crime in circumstances under which
27 subdivision (a), (b), or (c) would apply.

28 (m) (1) A proceeding to recover the civil fines specified in
29 subdivision (d) or (e) may be brought in any court of competent
30 jurisdiction by a county counsel or city attorney.

31 (2) Fines collected pursuant to this subdivision shall be allocated,
32 as follows:

33 (A) One-half shall be allocated to the prosecuting agency.

34 (B) One-half shall be deposited in the Arts and Entertainment
35 Fund, which is hereby created in the State Treasury.

36 (3) Funds in the Arts and Entertainment Fund created pursuant
37 to paragraph (2) may be expended by the California Arts Council,
38 upon appropriation by the Legislature, to issue grants pursuant to
39 the Dixon-Zenovich-Maddy California Arts Act of 1975 (Chapter

1 9 (commencing with Section 8750) of Division 1 of Title 2 of the
2 Government Code).

3 (4) The rights and remedies provided in this subdivision are
4 cumulative and in addition to any other rights and remedies
5 provided by law.

6 (n) The provisions of this section are severable. If any provision
7 of this section or its application is held invalid, that invalidity shall
8 not affect other provisions or applications that can be given effect
9 without the invalid provision or application.

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